

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

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KENNETH G. MCDONALD,
Plaintiff,
v.
BRIAN WILLIAMS, et al.,
Defendants

Case No. 2:17-cv-03066-RFB-DJA

ORDER

Plaintiff, who is a prisoner in the custody of the Nevada Department of Corrections (“NDOC”), and is serving his sentence as a Nevada Boarder at the Saguaro Correctional Center (“Saguaro”), a private prison run by CoreCivic in Arizona, has filed motions for a preliminary injunction and temporary restraining order in this case. ECF Nos. 11, 12. Defendants have also subsequently filed a motion to dismiss. ECF No. 37. For the following reasons, the Court grants Defendants’ motion to dismiss and denies the other motions.

1. PROCEDURAL BACKGROUND

On December 14, 2017, Plaintiff filed his original complaint. ECF No. 1-1. On September 14, 2018, the Court screened the complaint and dismissed the complaint as follows: (1) Count I, alleging deliberate indifference to unsafe prison conditions, dismissed without prejudice, with leave to amend; (2) Count II, alleging due process violations, dismissed with prejudice, as amendment is futile; and (3) Count II, alleging equal protection violations, dismissed, without

1 prejudice, with leave to amend. ECF No. 4. On October 10, 2018, Plaintiff filed his First Amended
2 Complaint (“FAC”), which is now the operative complaint in this case. ECF No. 6. On May 16,
3 2019, Plaintiff filed his motions for a temporary restraining order and preliminary injunction. ECF
4 Nos. 11, 12. The Court ordered a response to Plaintiffs’ motions from Defendants on May 17,
5 2019. ECF No. 13. Defendants filed their responses and attached Plaintiffs’ medical records
6 regarding eye care on May 24, 2019. ECF Nos. 14, 15,16. On May 31, 2019, the Court screened
7 Plaintiff’s first amended complaint and allowed Plaintiffs’ deliberate indifference to unsafe prison
8 conditions and equal protection claims to proceed. ECF No. 17. On August 16, 2019, an inmate
9 early mediation conference was scheduled and then postponed so that Plaintiff could appear by
10 video. ECF No. 19. The inmate early mediation conference was held on September 20, 2019. ECF
11 No. 27. A settlement was not reached. *Id.* Plaintiff filed an emergency reply to his motions on
12 September 30, 2019. ECF No. 30. On November 22, 2019, Defendants filed a motion to dismiss.
13 ECF No. 37. A response and reply were filed. ECF Nos. 40, 41.

17 **II. FACTUAL BACKGROUND**

18 Plaintiff makes the following allegations in his complaint and motions for temporary
19 restraining order and preliminary injunction:

21 While incarcerated at High Desert State Prison, on December 11, 2016 at about 12:30 PM,
22 Plaintiff was working on the floor crew when he was informed that Defendant Warden Brian
23 Williams and other administrative prison officials wanted the “old wax” stripped off the floor and
24 a fresh coat of floor wax applied. Plaintiff then got a bucket and the wax stripper in preparation to
25 strip the old wax from the floor. As Plaintiff poured the stripper into the bucket, the stripper
26 unexpectedly splashed into Plaintiff’s left eye. Upon entering his eye, the stripper caused the eye
27 to burn immediately. Plaintiff entered the bathroom with a crew member and began to splash cold
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1 water on his face and into his left eye. Plaintiff did this for approximately five minutes. He exited
2 the bathroom once he could partially see again even though the burning had not yet stopped. At
3 this point, Plaintiff's left eye was "as red as a tomato" because of the irritation. Plaintiff informed
4 Lieutenant Potter about what had occurred, and Potter immediately ordered an officer to escort
5 Plaintiff to the infirmary. At the infirmary, the nurse requested the chemical ingredients in the
6 stripper. She then placed Plaintiff under the water where he rinsed his eye for an additional fifteen
7 minutes. The nurse explained to Plaintiff that the stripper was highly corrosive and that he was
8 lucky it did not get into both eyes. The nurse then had Plaintiff perform an eye chart test and
9 discovered that Plaintiff's eye was so damaged that he needed to be transported from HDSP to an
10 eye specialist at an outside facility. Plaintiff was then driven to University Medical Center
11 ("UMC") in Las Vegas for specialized treatment. At UMC, on December 11, 2016, Plaintiff was
12 seen and examined by a series of nurses and doctors. One of the physicians that treated Plaintiff
13 informed him that he was not supposed to be exposed to toxic chemicals without the proper eye
14 gear and safety garb.

15 Plaintiff alleges that Defendants Williams, Nash, Howell, Russel, Alvardo, and Potter
16 failed to establish safety rules at HDSP or provide safety gear and that defendants knew that these
17 chemicals were potentially hazardous and could cause "an excessive risk of harm to inmate safety."
18 Plaintiff also alleges that he notified defendants prior to the accident about his safety concerns.
19 Plaintiff also alleges that defendants were aware of the potential danger of the floor stripper as
20 evidenced by prison staff's use of gloves and protective equipment when they handled such
21 chemicals and cleaners. After treatment and consultation with UMC eye specialists, Plaintiff was
22 informed that his eye had severe inflammation from the chemical in the stripper and that the pain
23 would or could continue. Plaintiff was also told that the worst-case scenario would be that the
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1 damage to his eye could result in permanent eye damage. The doctor advised that Plaintiff should
2 be returned to UMC the next day, December 12. However, prison officials failed to bring Plaintiff
3 to UMC on that day for follow up. Plaintiff therefore suffered increased pain that day. When
4 Plaintiff's vision was tested on December 11 at UMC, the doctor informed Plaintiff that he had
5 lost a certain percentage of normal vision. That damage remains to this day and has caused blurred
6 and double vision. As a result of the eye injury, Plaintiff is now required to wear prescription
7 eyeglasses.

8 On December 21, 2016, a special investigator interviewed Plaintiff to find out what had
9 happened. The investigator advised Plaintiff that he would inform the warden and administrative
10 prison officials to always have available to inmates the appropriate protective gear and establish a
11 policy to protect inmates from injuries. The investigator would also suggest that the chemical
12 potency of the products used at the prison be lessened for purposes of safety going forward. HDSP
13 administration immediately set in motion safety rules and provided safety eye goggles after
14 Plaintiff's accident.

15 On January 30, 2017, Plaintiff saw HDSP nursing staff about an eye appointment and the
16 incident. On January 8 and January 14, 2017, Plaintiff put in a kite requesting to see an eye doctor
17 for his injury and for eyeglasses. On March 25, 2017, Plaintiff had an appointment with the eye
18 doctor, and that doctor determined Plaintiff's eyes were damaged from the December 11 incident.
19 The doctor ordered glasses for Plaintiff. On May 3, 2017, Plaintiff saw and spoke with Nurse
20 Tonya, who advised Plaintiff she would get Plaintiff his eyeglasses. On May 8, 2017, Plaintiff
21 received his prescription eyeglasses. On December 21, 2016, Plaintiff filed his informal grievance
22 regarding the December 11 incident. On March 8, 2017, Plaintiff filed his first level grievance
23 regarding the incident, and on June 6, 2017, the grievance process had been completed. Plaintiff
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1 states that he wrote a letter to OSHA on December 31, 2016, and he also wrote a letter to the
2 Department of Labor and OSHA on February 28 and June 8, 2017. On March 9, 2017, Plaintiff
3 received a letter from the Nevada regional OSHA office, indicating that the stripper that had
4 splashed into his eye should be used with gloves and eye protection if one feels that one could
5 splash the product onto the skin or into one's eyes while using it. It also explained that prison
6 employees would need to be trained on the hazards associated with the product. By letter dated
7 May 17, 2017, the Department of Labor explained that "state plans are required to have standards
8 and enforce programs that are at least as effective as OSHA's."
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10 On December 13, 2018 Plaintiff resubmitted a grievance concerning corrections officers
11 intentionally refusing to mail his first amended complaint to the Court. About six days later, on
12 December 19, 2018, Plaintiff was taken to the transportation building at HDSP where he was
13 informed that he would be placed and transferred to a private prion in Arizona. The same
14 corrections officer informed Plaintiff that the transport was ordered by Associate Warden Jennifer
15 Nash ("Nash") of HDSP. Plaintiff was transferred to Saguaro in Arizona that same day.
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17 Plaintiff was not afforded any type of due process hearing concerning the transfer from
18 Nevada to Arizona. Plaintiff alleges that being transferred out of state by Nash was retaliation for
19 Plaintiff having initiated this action in this Court. Plaintiff has to wear prescription glasses now
20 because of the incident that took place on December 11, 2016. When he was transferred, Plaintiff
21 was medically screened, and he informed the medical staff that he wears glasses. On January 4,
22 2019, Plaintiff put in a medical request for new glasses. A nurse saw him approximately ten days
23 later. The nurse performed a scaled down paper chart eye test exam. The nurse explained that a
24 request for funds had to be made by CCA/Sagurao to the NDOC for Plaintiff to see an optometrist.
25 Plaintiff received no eye care. Plaintiff explained that he was experiencing severe headache from
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1 light sensitivity in his left eye, and that his left eye feels strained. Plaintiff writes that this has been
2 causing him pain as well as mental and emotional injury. Plaintiff filed another medical kite on
3 April 6, 2019 for glasses after seeing multiple Nevada inmates meet with an optometrist, and
4 receive their glasses. Plaintiff complains that his vision is getting worse as times goes by and that
5 he fears irreparable harm. He also feels that not seeing the correct medical personnel will cause
6 permanent damage to his eye.
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9 Plaintiff further alleges that he is the victim of retaliation because according to Nevada
10 Department of Corrections Director Dzurenda, only the “worst of the worse of N.V. inmates were
11 to be sent to CCA/Saguaro.”

12 Plaintiff seeks a temporary restraining order and injunction to be transferred back to the
13 State of Nevada and to be placed back at the Southern Institution in Level One, and once there to
14 receive proper care from an optometrist. He also seeks to be placed back in his working position
15 on the floor crew/paint crew so that he may return to earning work time credits. Finally, he seeks
16 a restraining order or TRO against Nash from further retaliatory acts against Plaintiff, including
17 acts such as transfers to out of state prisons/and or maximum security prisons without due process
18 and/or unproven claims, having Nash reside over any grievances, request forms, program
19 activities, or anything of the like.
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22 In his reply to the instant motions, Plaintiff further alleges that on July 11, 2019, he
23 submitted another medical request for eye care. He was seen by a nurse on July 13, 2019. Plaintiff
24 states that the nurse informed him that he would not receive eye care while housed at Saguaro.
25 Plaintiff attaches to his reply as his Exhibit A, a sick call request placed with Saguaro dated July
26 13, 2019 in which he is told that he “do[es] not meet the criteria to see the eye doctor at this time.
27 This was determined after you seen[sic] the nurse on sick call and had an eye exam.” Plaintiff also
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1 attaches a sick call request dated August 26, 2019 from another inmate, Exhibit B to his reply, in
2 which the inmate is told by Health Services that “there is a waiting list for the eye doctor at this
3 time. You will be seen in November 2019.”

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5 On November 12, 2019, Plaintiff filed a notice re prison conditions in which he informed
6 the Court that he continues to be asked to strip wax off the floors in the new facility at Saguaro,
7 but without being given the safety equipment that he needs, including eye goggles.
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9 Plaintiff also alleges in his response to the motion to dismiss that as of December 10, 2019,
10 he has yet to have seen an optometrist.

11 **III. LEGAL STANDARD**

12 Courts may grant preliminary injunctions and temporary restraining orders pursuant to
13 Rule 65 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 65. The analysis for
14 a temporary restraining order is “substantially identical” to that of a preliminary
15 injunction. Stuhlbarg Intern. Sales Co., Inc. v. John D. Brush & Co., Inc., 240 F.3d 832, 839 n.7
16 (9th Cir. 2001). A preliminary injunction is “an extraordinary remedy that may only be awarded
17 upon a clear showing that the plaintiff is entitled to such relief.” Winter v. Natural Res. Def.
18 Council, Inc., 555 U.S. 7, 22 (2008). To obtain a preliminary injunction, a plaintiff must establish
19 four elements: “(1) a likelihood of success on the merits, (2) that the plaintiff will likely suffer
20 irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in its
21 favor, and (4) that the public interest favors an injunction.” Wells Fargo & Co. v. ABD Ins. & Fin.
22 Servs., Inc., 758 F.3d 1069, 1071 (9th Cir. 2014), as amended (Mar. 11, 2014) (citing Winter, 555
23 U.S. 7, 20 (2008)). A preliminary injunction may also issue under the “serious questions”
24 test. Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134 (9th Cir. 2011) (affirming the
25 continued viability of this doctrine post-Winter). According to this test, a plaintiff can obtain a
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1 preliminary injunction by demonstrating “that serious questions going to the merits were raised
2 and the balance of hardships tips sharply in the plaintiff’s favor,” in addition to the
3 other Winter elements. Id. at 1134-35 (citation omitted).

5 A temporary restraining order may be issued without notice to the adverse party only if the
6 moving party: (1) provides a sworn statement clearly demonstrating “that immediate and
7 irreparable injury, loss, or damage will result to the movant before the adverse party can be heard
8 in opposition,” and (2) sets forth the efforts made to notify the opposing party and why notice
9 should not be required. Fed. R. Civ. P. 65(b)(1). Temporary restraining orders issued without
10 notice “are no doubt necessary in certain circumstances, but under federal law they should be
11 restricted to serving their underlying purpose of preserving the status quo and
12 preventing irreparable harm just so long as is necessary to hold a hearing, and no longer.” Granny
13 Goose Foods, Inc. v. Bhd. of Teamsters, 415 U.S. 423, 439 (1974) (citation omitted).

16 When a party is pro se, the Court must liberally construe his or her documents. Erickson v.
17 Pardus, 551 U.S. 89, 94 (2007).

18 **IV. DISCUSSION**

19 **a. Preliminary Injunction/TRO**

21 The Ninth Circuit has held “that there must be a relationship between the injury claimed in
22 the motion for injunctive relief and the conduct asserted in the underlying complaint.” Pac.
23 Radiation Oncology, LLC v. Queen’s Med. Ctr., 810 F.3d 631, 636 (9th Cir. 2015). The Ninth
24 Circuit further explains that a sufficient nexus exists between the preliminary injunction and the
25 underlying complaint when “the preliminary injunction would grant relief of the same character
26 as that which may be granted finally.” Id. (internal citations omitted). In his complaint, Plaintiff
27 seeks \$300,000 in compensatory damages and \$10,000 in punitive damages and asks that “NDOC
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1 pay for all medical costs now paid in the future.”
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3 The Court finds that the injunctive relief Plaintiff seeks is primarily related to claims that
4 were not pled in Plaintiff’s complaint. Plaintiff’s allegation that his transfer to Saguaro is
5 retaliation and that he was afforded no due process prior to his transfer are retaliation and due
6 process claims. These claims were not alleged in Plaintiff’s complaint. Because there is no
7 sufficient nexus between the injunctive relief sought and the conduct alleged in the underlying
8 complaint, the Court cannot grant the relief requested with regard to those claims.
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10 However, the Supreme Court has found that allegations in motions for a temporary
11 restraining order and preliminary injunction, together with supporting affidavit and briefs, may be
12 adequate to apprise the defending party of the claims against them. Schlesinger v. Councilman,
13 420 U.S. 738, 742 n.5 (1975). This, in combination with the Court’s duty to construe pro se
14 complaints liberally, will permit the Court to construe Plaintiff’s complaint as alleging a deliberate
15 indifference to serious medical needs claim, which is sufficiently connected to Plaintiff’s
16 injunctive relief seeking requested eyecare.
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18 A prison official violates the Eighth Amendment when he acts with “deliberate
19 indifference” to the serious medical needs of an inmate. Farmer v. Brennan, 511 U.S. 825, 828
20 (1994). “To establish an Eighth Amendment violation, a plaintiff must satisfy both an objective
21 standard—that the deprivation was serious enough to constitute cruel and unusual punishment—
22 and a subjective standard—deliberate indifference.” Snow v. McDaniel, 681 F.3d 978, 985 (9th
23 Cir. 2012).
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25 To establish the first prong, “the plaintiff must show a serious medical need by
26 demonstrating that failure to treat a prisoner’s condition could result in further significant injury
27 or the unnecessary and wanton infliction of pain.” Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir.
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1 2006) (internal quotations omitted). To satisfy the deliberate indifference prong, a plaintiff must
2 show “(a) a purposeful act or failure to respond to a prisoner’s pain or possible medical need and
3 (b) harm caused by the indifference.” Id. “Indifference may appear when prison officials deny,
4 delay or intentionally interfere with medical treatment, or it may be shown by the way in which
5 prison physicians provide medical care.” Id. (internal quotations omitted). When a prisoner
6 alleges that delay of medical treatment evinces deliberate indifference, the prisoner must show that
7 the delay led to further injury. See Shapley v. Nevada Bd. of State Prison Comm’rs, 766 F.2d 404,
8 407 (9th Cir. 1985) (holding that “mere delay of surgery, without more, is insufficient to state a
9 claim of deliberate medical indifference”).

12 The Court finds that Plaintiff has raised serious questions going to the merits of a deliberate
13 indifference claim and that the balance of hardships tips in his favor. Plaintiff has alleged facts
14 sufficient to demonstrate that Defendants have deliberately delayed getting adequate treatment to
15 Plaintiff, and that the delay has caused Plaintiff further pain and injury. ECF No. 12, Pl.’s Mot.
16 Preliminary Injunction (“Plaintiff complains that his vision is getting worse as time goes by . . .”).
17 Defendants assured the Court in their response to Plaintiff’s emergency motions that they “would
18 represent that they will contact SCC medical staff and attempt to expedite the process.” ECF No.
19 14, Def.’s Resp. Opp’n Mot. Preliminary Injunction 11. But Defendants have not submitted
20 anything to the Court indicating that they have in fact done so.

23 Plaintiff has also raised questions as to the accuracy of the medical records submitted,
24 which included an initial intake screening for Saguaro that stated that Plaintiff did not use
25 prescription eyeglasses and has 20/20 vision in the eye involved in the wax stripping chemical
26 incident. Plaintiff alleges that the eye exam that Saguaro Correctional Center used to determine
27 whether Plaintiff met criteria to see an eye doctor required him to read the three top lines of an eye
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1 chart held in his hands, rather than twenty feet away, as the chart required. The Court also notes
2 that the medical records provided only documents Plaintiff's medical history since his
3 incarceration at Saguaro Correctional Center, rather than since the incident involving the wax
4 stripper, which is the incident that prompted Plaintiff's need for eyeglasses. Furthermore, as of
5 December 10, 2019, Plaintiff has still not been seen by an eyecare professional, several months
6 after he first made the request. ECF No. 40, Pl.'s Resp. Opp'n Mot. Dismiss at 5. Id. The Court
7 thus finds that the balance of equities tips in favor of Plaintiff receiving the requisite eyecare. The
8 Court will subsequently grant Plaintiff's injunction only to the extent of ordering the NDOC to
9 provide Plaintiff with the requested eyecare.

12 The Court significantly narrows Plaintiff's injunctive relief and notes that even if Plaintiff
13 were to amend his complaint to include retaliation and due process claims, the Court would not
14 necessarily then grant a renewed motion for a preliminary injunction on those claims. First, the
15 Prison Litigation Reform Act requires that injunctive relief granted to prisoners be narrowly
16 drawn, and an order to have Plaintiff transferred back to Nevada on the ground of inadequate
17 healthcare at Saguaro is not narrowly drawn. 18 U.S.C. § 3626 (a)(2). Second, the Supreme Court
18 has already found that there is no constitutionally protected liberty interest in an interstate prison
19 transfer. Olim v. Wakinekona, 461 U.S. 238, 245– 46 (1983).

22 The Court has jurisdiction to grant this injunction because, although Plaintiff is currently
23 incarcerated in Arizona, he remains under custody of the Nevada Department of Corrections, and
24 Saguaro Correction Center functions as an agent of the Nevada Department of Corrections in this
25 case.

26 **b. Motion to Dismiss**

28 In their motion to dismiss, Defendants argue that because Plaintiff's complaint asks only

1 for monetary damages, the Eleventh Amendment bars him from bringing suit against them. The
2 Eleventh Amendment bars suits against state officials in their official capacity unless Congress
3 has abrogated state sovereign immunity under its power to enforce the Fourteenth Amendment or
4 the state has waived it. Holley v. Calif. Dep’t of Corrections, 599 F.3d 1108, 1111 (9th Cir. 2010).
5 However, the Supreme Court has previously allowed an exception to Eleventh Amendment
6 sovereign immunity in cases where a plaintiff brings suit against a state official alleging a violation
7 of federal law. Ex Parte Young, 209 U.S. 123 (1908). Under this exception, the court may award
8 prospective injunctive relief that governs the official’s future conduct, but may not award
9 retroactive relief that requires payment of funds from the state treasury. Natural Res. Def. Council
10 v. Calif. Dep’t of Transp., 96 F.3d 420 (9th Cir. 1996); citing Pennhurst 465 U.S. 89, 101 (1984).
11 In the context of § 1983 claims, this means that Eleventh Amendment immunity prevents prisoners
12 with § 1983 claims from recovering monetary damages. See Peralta v. Dillard, 744 F.3d 1076,
13 1083 (9th Cir. 2014) (noting that Eleventh Amendment immunity prevents prisoners from
14 recovering monetary damages for § 1983 violations).
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16 Plaintiff argues in return that he does seek injunctive relief in his complaint, because his
17 request that the prison cover all current and future medical expenses is prospective injunctive
18 relief. The Court agrees with Plaintiff, and also notes that in Plaintiff’s motion for a preliminary
19 injunction, he asks for transfer back to HDSP specifically so he can receive eyecare. Thus while
20 the Court finds that Eleventh Amendment immunity operates to dismiss Plaintiff’s damages claims
21 against the NDOC officers in their official capacities, it will not wholly dismiss the complaint, and
22 will allow the claims for injunctive relief to proceed.
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V. CONCLUSION

For the foregoing reasons, **IT IS ORDERED** that Plaintiff's Motions for a Preliminary Injunction (ECF No. 11) and for a Temporary Restraining Order (ECF No. 12) are granted in part as follows: the Nevada Department of Corrections **is ORDERED** to provide Plaintiff with an appointment with an optometrist by March 31, 2020, or file a notice with the Court explaining why the order was not complied with by that date.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss (ECF No. 37) is **GRANTED** in part. The Court dismisses all Plaintiff's claims for monetary damages against Defendants Brian Williams, Jennifer Nash, Howell, Russell, Lt. Potter, and Alvarado in their official capacity. The Court does not dismiss Plaintiff's claims for injunctive relief.

DATED March 16, 2020.

RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE